U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0278 BLA

JAMES D. WASHINGTON Claimant-Respondent v. PATRIOT COAL/PEABODY COAL COMPANY/Self-Insured Through OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/20/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5326) of Administrative Law Judge Joseph E. Kane (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with thirty-one years of underground coal mine employment, as stipulated by the parties, and adjudicated this miner's claim, filed on July 14, 2009, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish total respiratory disability, and, therefore, sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that the administrative law judge abused his discretion and erred in his application of 20 C.F.R. §725.414 by excluding evidence provided by Drs. Renn and Mutchler in rebuttal to Dr. Knight's February 2, 2010 pulmonary function study report. On the merits, employer challenges the administrative law judge's analysis in finding the evidence sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), thereby invoking the amended Section 411(c)(4) presumption, and in finding that employer failed to establish rebuttal of the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's evidentiary challenges. Employer has filed a combined reply brief in support of its position.[2]

[1] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the evidentiary issues, we reject employer's contention that the administrative law judge erred in excluding Dr. Renn's April 7, 2012 assessment of Dr. Knight's pulmonary function study from the record. Employer's Exhibit 10. Claimant submitted Dr. Knight's February 5, 2010 pulmonary function study into the record in support of his affirmative case. Claimant's Exhibit 2. Employer designated Dr. Renn's May 13, 2010 assessment of Dr. Knight's study as its rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), Director's Exhibit 34-2, and claimant responded, pursuant to 20 C.F.R. §725.414(a)(2)(ii), with an additional statement from Dr. Knight explaining his conclusion in light of employer's rebuttal evidence. Claimant's Exhibit 3. As the pertinent regulation at Section 725.414(a)(3)(ii), (d) does not provide employer with an opportunity to rebut Dr. Knight's rehabilitative evidence, absent a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), and employer waived any good cause argument by failing to raise it before the administrative law judge, we affirm the administrative law judge's exclusion of Dr. Renn's April 7, 2012 report in surrebuttal from the record. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007); *see also Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003).

Employer also argues that the administrative law judge erred in excluding "the portions of [Employer's Exhibits 3, 4, and 6] wherein Dr. Mutchler directly rebuts Dr. Knight's February 5, 2010 [pulmonary function test]" from the record. Decision and Order at 16. Employer argues that Dr. Mutchler's rebuttal of the lung volume and diffusing capacity (DLCO) testing that Dr. Knight conducted in conjunction with the February 5, 2010 pulmonary function study is not subject to the evidentiary limitations, as such testing is not included in the regulation at 20 C.F.R. §718.103(a). Employer asserts that Dr. Mutchler's comments are not an attack on Dr. Knight's testing but, rather, are a necessary part of Dr. Mutchler's presentation of his own opinion regarding claimant's respiratory condition. Employer's Brief at 27. Employer's arguments lack merit. As the Director points out, whether the lung volume and DLCO testing are properly part of a pulmonary function study or, alternatively, qualify as "other medical

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Hearing Transcript at 25, 30.

testing" pursuant to 20 C.F.R. §718.107, employer is entitled to submit only one physician's assessment in response to Dr. Knight's testing, and employer submitted Dr. Renn's July 13, 2011 record review in which he considered all of Dr. Knight's 2010 testing. Employer's Exhibit 2. We, therefore, affirm the administrative law judge's decision to exclude Employer's Exhibits 3 and 4 and portions of Employer's Exhibit 6 from the record. The Director correctly notes, however, that Dr. Mutchler's deposition testimony regarding any admissible evidence of record is permissible pursuant to 20 C.F.R. §725.458.[4]

Next, we address employer's contention that the administrative law judge, in finding invocation of the amended Section 411(c)(4) presumption established, erred in weighing the evidence relevant to total respiratory disability pursuant to 20 C.F.R. §718.204(b). Employer challenges the administrative law judge's reliance on the medical opinion of Dr. Knight over the opinions of Drs. Mutchler and Renn, arguing that the administrative law judge substituted his judgment for that of the experts regarding the pulmonary function study results; that he mischaracterized the opinions of Drs. Mutcher and Renn; that he applied inconsistent scrutiny to the opinion of Dr. Knight; and that he failed to provide a rational explanation for crediting Dr. Knight's opinion as well-reasoned and documented. Employer also argues that the administrative law judge failed to consider the contrary probative evidence, including claimant's treatment records, weighing against a finding of total respiratory disability. Employer's Brief at 12-20. Some of employer's arguments have merit.

At Section 718.204(b)(2)(i), the administrative law judge found that the pulmonary function study evidence of record failed to establish total respiratory disability, as none of the three pulmonary function studies of record produced qualifying

[4] Section 725.458 provides, in pertinent part, that "[t]he testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of the testimony contained in [20 C.F.R.] §725.457(d)." 20 C.F.R. §725.458. Section 725.457(d) provides, in pertinent part, that "[a] physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible." 20 C.F.R. §§725.457(d). The Director, Office of Worker's Compensation Programs (the Director), notes that Dr. Mutchler's deposition testimony commented at length regarding the contents of his May 25, 2010 report, which directly addressed Dr. Knight's February 5, 2010 pulmonary function testing. Director's Brief at 4 n.3; *see* Employer's Exhibit 6 at 32-50; Director's Exhibit 34. However, as employer withdrew Dr. Mutchler's May 25, 2010 report at the hearing, *see* Hearing Transcript at 6-7, the Director correctly maintains that the portion of Dr. Mutchler's deposition addressing the contents of that report is not admissible and was properly excluded. *Id.*

results.[5] Decision and Order at 19. The administrative law judge further determined that the blood gas studies of record failed to establish total respiratory disability at Section 718.204(b)(2)(ii), as neither of the studies produced qualifying results. Decision and Order at 20. After determining that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge considered the medical opinions of Drs. Archer,[6] Knight, Mutchler, and Renn at Section 718.204(b)(2)(iv). The administrative law judge noted that Dr. Knight[7] opined that claimant was totally disabled from performing his last coal mining job, and that, in making his diagnosis, the doctor reviewed claimant's work history, Director's Exhibit 3, and claimant's own description of his coal mining duties as set out in Director's Exhibit 4, which the administrative law judge determined "adequately describes the exertional requirements of [claimant's] last job as a roof bolter."[8] Decision and Order at 20;

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed the requisite table values.

[6] Dr. Archer is Board-certified in cardiovascular diseases and internal medicine. Claimant's Exhibit 4. The administrative law judge determined that Dr. Archer's opinion was not probative on the issue of total respiratory disability, as he did not specifically provide an opinion regarding whether claimant had the pulmonary capacity to perform his previous coal mine employment. Decision and Order at 21.

[7] Dr. Knight performed the Department of Labor examination on September 17, 2009, and found a combined mild restriction and obstruction. He diagnosed chronic obstructive pulmonary disease with restriction due to coal dust exposure, based on examination, testing, and claimant's history as a nonsmoker. He stated that claimant was totally disabled from performing his last coal mine employment, based on his abnormal resting blood gas study and his pulmonary function study results. Director's Exhibit 12. On February 5, 2010, Dr. Knight performed another examination and determined that his 2010 studies were more indicative of the patient's actual situation in that there was broader testing, which included not only spirometry but lung volumes and diffusion capacity. He diagnosed a mild to moderate restrictive impairment due to coal dust, which is disabling. He based his finding on "the decrement in claimant's FVC, as confirmed by reduced lung volumes." He could not attribute the restriction to a cardiac impairment, which he determined was "a minor and mild valvular disease." Director's Exhibit 33-1; Claimant's Exhibits 2, 3.

[8] Claimant described the physical demands of his job as requiring him to sit for one-half to one hour per day; stand for 7.5-8 hours per day; lift 35 pounds of pins or bolts

Claimant's Exhibit 3. The administrative law judge further noted that Drs. Mutchler and Renn determined that claimant was not totally disabled, as they both opined that, from a pulmonary perspective, claimant would be able to perform the job duties of a roof bolter. Decision and Order at 21-22; Director's Exhibit 28; Employer's Exhibits 2, 5. After summarizing the doctors' respective opinions, the administrative law judge accorded less weight to the opinions of Drs. Mutchler and Renn. The administrative law judge found that Dr. Mutchler[9] did not have an adequate understanding of claimant's job duties, as his medical report reflected that claimant's job as a roof bolter demanded the exertional requirements of "lift[ing] and load[ing] roof bolts, to a total of 100-150 pounds per day," rather than lifting 100-150 roof bolts per day. The administrative law judge also noted that Dr. Mutchler based his analysis of Dr. Knight's pulmonary function results on adjusted spirometry values rather than the actual values from Dr. Knight's pulmonary function testing, which the administrative law judge found to be in substantial compliance with the quality standards set forth in Section 718.103 and Appendix B. Decision and Order at 22; Director's Exhibit 28. The administrative law judge further determined that Dr. Renn's opinion[10] was unsupported and conclusory, because he failed

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100-150 times per day; lift 35-40 pounds of glue boxes 8-10 times per day; and lift 3-10 pounds of boards and plates 40-50 times per day. Director's Exhibit 4.

[9] Dr. Mutchler examined claimant on January 19, 2010 and reviewed other medical testing. He found that, while there was a suggestion of pulmonary restriction on spirometry, there was no restrictive or obstructive lung disorder based on all other testing, and concluded that claimant did not suffer from any intrinsic lung disease. He indicated that most all of claimant's respiratory complaints are routine and best accounted for by other secondary factors, such as GERD, obesity, probable sleep apnea, organic heart disorders, cardiac medication, and "variable restrictive findings on spirometry most consistent with extrinsic causes," with no obstructive physiology on spirometry, normal lung volumes and normal gas exchange. He determined that claimant should be able to perform the exertional requirements of an underground roof bolter "from a pure pulmonary perspective," but doubted that claimant could tolerate the job duties, given his other medical conditions. Director's Exhibit 28; Employer's Exhibit 6.

[10] Dr. Renn performed a medical records review on July 13, 2011, and diagnosed a mild restrictive ventilatory defect owing to arteriosclerotic cardiovascular disease, systemic hypertension, cardiomegaly, and exogenous obesity. Employer's Exhibit 2. He testified that all of the x-rays show that claimant has an enlarged heart, which acts in concert with coronary heart disease and hypertension to reduce claimant's FEV_1 and his FVC sufficiently to give the appearance of a restrictive ventilatory defect. Employer's Exhibit 5 at 7. Dr. Renn opined that claimant has a very mild restriction with normal gas exchange and does not have a disabling level of pulmonary impairment, although "whether or not [claimant] could do [his job as a roof bolter with] the cardiovascular

to adequately explain his conclusion that claimant was able, from a pulmonary standpoint, to return to his last coal mining job requiring heavy manual labor, in light of claimant's restrictive ventilatory defect. Decision and Order at 22; Employer's Exhibits 2, 5. According the greatest weight to Dr. Knight's opinion on the ground that the physician adequately understood the arduous exertional requirements of claimant's usual coal mining job, the administrative law judge found that claimant established total respiratory disability and invocation of the amended Section 411(c)(4) presumption. Decision and Order at 22.

We agree with employer that the administrative law judge, in finding that the weight of the medical opinion evidence established the presence of a totally disabling respiratory or pulmonary impairment, erred in determining that Dr. Mutchler did not have an adequate understanding of the exertional requirements of claimant's usual coal mine employment. While the administrative law judge correctly noted that Dr. Mutchler's report contained a misstatement regarding the exertional requirements of one of claimant's job duties, he failed to address Dr. Mutchler's deposition testimony, wherein he noted requirements that matched those described by claimant in Director's Exhibit 4, and those relied on by Dr. Knight, suggesting that Dr. Mutchler, in fact, had an adequate understanding of claimant's job duties when he concluded that there was "no evidence for any overt primary lung disorder," and that claimant should be able to perform the job duties of a roof bolter "from a pure pulmonary perspective." Employer's Exhibits 4, 28; Employer's Exhibit 6 at 18-19. Additionally, in determining that Dr. Mutchler's opinion was entitled to lesser weight because, in his medical report, the physician based his analysis of claimant's spirometry on corrected measurements, rather than the actual values in Dr. Knight's pulmonary function study, the administrative law judge failed to consider Dr. Mutchler's deposition testimony or the fact that Dr. Mutchler included Dr. Knight's actual, non-qualifying values in his report. Further, Dr. Mutchler's report referenced Dr. Knight's 2009 pulmonary function study, which Dr. Knight determined was less indicative of claimant's actual respiratory condition than was the 2010 testing, because the 2009 study did not include lung volume and diffusion capacity testing. Director's Exhibit 33-1. We find no error, however, in the administrative law judge's determination that Dr. Renn's opinion was conclusory, as he diagnosed claimant with a mild restrictive ventilatory defect but failed to explain why he believed claimant would be able to perform, from a respiratory or pulmonary perspective, his usual coal mine employment of a roof bolter, a job requiring "very heavy manual labor," as determined by the administrative law judge. Decision and Order at 19. As we cannot affirm the

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diseases," he could not say. Employer's Exhibit 5 at 28, 52, 54. Dr. Renn opined that claimant is not totally disabled to the extent that he would be unable to perform any of his past coal mine employment or work of similar effort, and that claimant "should be able to do heavy manual labor." Employer's Exhibits 2, 5 at 53.

administrative law judge's rationale for discounting the opinion of Dr. Mutchler, we must vacate the administrative law judge's finding of total respiratory disability at Section 718.204(b).

On remand, the administrative law judge is instructed to reassess Dr. Mutchler's opinion, taking into account his deposition testimony, and then must reweigh the conflicting medical opinions in light of the physicians' explanations for their medical findings, the documentation underlying their medical judgments, and the reasoning and bases of their diagnoses, and fully explain the rationale for his credibility determinations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Collins v. J & L Steel*, 21 BLR 1-181, 1-189 (1999); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-126 (1989). Because we have vacated the administrative law judge's finding that the evidence established total disability, we also vacate his finding that claimant invoked the amended Section 411(c)(4) presumption, and the award of benefits. On remand, should the administrative law judge find that the medical opinion evidence establishes total respiratory disability pursuant to Section 718.204(b)(2)(iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). If the administrative law judge determines that claimant has established total disability pursuant to Section 718.204(b), and is entitled to invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal of the presumption with affirmative proof that claimant does not have pneumoconiosis, or that no part of his respiratory or pulmonary disability was caused by pneumoconiosis as defined in Section 718.201. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., BLR , BRB No. 13-0544 BLA (Apr. 21, 2015)(Boggs, J., concurring and dissenting).

Accordingly, we affirm, in part, and vacate, in part, the administrative law judge's Decision and Order Awarding Benefits, and remand this case for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge